No. 03-74628

IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB, and PEG PINARD,
Petitioners,

v.

THE UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,
Respondents

PACIFIC GAS & ELECTRIC COMPANY,
Intervenor-Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE UNITED STATES NUCLEAR REGULATORY COMMISSION

AMICUS BRIEF OF THE NUCLEAR ENERGY INSTITUTE IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND INTEREST OF THE AMICUS CURIAE NUCLEAR ENERGY INSTITUTE

Amicus Nuclear Energy Institute ("NEI") submits this brief pursuant to Federal Rule of Appellate Procedure 29(a) urging the Court to affirm the decision of Respondent U.S. Nuclear Regulatory Commission ("NRC") to grant a license to Intervenor-Respondent Pacific Gas & Electric Company ("PG&E") to build an independent spent fuel storage installation ("the ISFSI") at the site of PG&E's Diablo Canyon Nuclear Power Plant ("Diablo Canyon"). The license[1] authorizes PG&E to store spent fuel assemblies from the Diablo Canyon reactor in concrete and steel dry storage casks.

Petitioners San Luis Obispo Mothers for Peace, *et al.* ("Petitioners") challenge the license on the principal ground that they were denied a hearing on whether the NRC should "prepare an Environmental Impact Statement ("EIS") to consider the environmental impacts of a terrorist attack or other act of malice or insanity against the ISFSI." Brief for Petitioners (March 15, 2004) ("Petitioners'

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[1] See March 22, 2004 letter from John D. Monninger (NRC) to Lawrence F. Womack (PG&E), *available online at* http://www.nrc.gov/reading-rm/adams/web-based.html (Accession No. ML040780207).

Br.") at 3.[2] Petitioners argue that the NRC has instituted "a general policy of refusing to consider the environmental impacts of terrorist attacks in EISs." *Id.* at 38. Petitioners' contend that prior to licensing the ISFSI the NRC is required under the National Environmental Policy Act ("NEPA") (42 U.S.C. §§ 4321-4370(f)) to prepare an EIS that considers evaluating the consequences of "destructive acts of malice and insanity" against the facility. *Id.* at 14, 16, 18, 20, 35, 48.

NEI files this *amicus curiae* brief because of the confusion and disruption that could result if Petitioners' patently invalid argument were accepted. NEI is the organization responsible for establishing unified policy on regulatory and other matters affecting the nuclear energy industry. NEI's members include all entities licensed by the NRC to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry. NEI has a vital interest in having NRC license applicants treated fairly, consistent with statutory and regulatory require-

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[2] Petitioners also challenge, *inter alia*, as a violation of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* ("AEA"), the NRC's decision not to grant them a hearing on what additional security measures should be required "to ensure that the proposed licensing of the ISFSI did not pose an undue security threat." Petitioners' Br. at 3. This issue is addressed in Part II below.

ments. While this case involves an ISFSI, the Court's decision could affect anyone seeking licensing action by the NRC, and may similarly impact other facilities and activities coming within NEPA's purview.

We emphasize at the outset that the NRC's licensing of the ISFSI was methodical, thorough, and rigorous. Regarding terrorism, sabotage and other malevolent acts, the AEA requires the NRC to impose such requirements as it deems necessary "to promote the common defense and security or to protect health or minimize danger to life or property." AEA § 161(b), 42 U.S.C. § 2201(b); *see also* 42 U.S.C. § 2201(i)(3); 42 U.S.C. § 2232(a). To implement this statutory mandate, the NRC has prescribed stringent physical security requirements in 10 C.F.R. Part 73 with which all licensees must comply. The NRC has stated that, as a result of these requirements,

> [N]uclear power plants are among the most hardened and secure industrial facilities in our nation. The many layers of protection offered by robust plant design features, sophisticated surveillance equipment, physical security protective features, professional security forces, access authorization requirements, and NRC regulatory oversight provide an effective deterrence against potential terrorist activities that could target equipment vital to nuclear safety.

Riverkeeper, Inc. v. Collins, 359 F.3d 156, 160 (2d Cir. 2004), *quoting* Samuel J. Collins, Director, NRC Office of Nuclear Reactor Regulation.

Before issuing the license for the ISFSI the NRC, as part of its AEA responsibilities, prepared a Safety Evaluation Report ("SER"). The SER concluded that the ISFSI meets all statutory and regulatory requirements and that its operation will provide adequate protection of public health, safety, and the environment. In particular, the SER determined that the ISFSI will comply with all applicable NRC security requirements.[3]

The SER's determination that the ISFSI conforms to applicable security requirements is important because of the nature of the requirements. Since September 11, 2001, the NRC has significantly increased the already robust security measures required under the AEA and 10 C.F.R. Part 73 to ensure that nuclear facilities are protected against terrorist attacks.[4] In carrying out its AEA responsibilities the NRC has, among other things, conducted a thorough review of its security requirements with the assistance of the Department of Homeland Security ("DHS"), the Federal Bureau of Investigation, and the Departments of Transporta-

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[3] *See* Safety Evaluation Report, Executive Summary at xvi, *available online at* http://www.nrc.gov/reading-rm/adams/web-based.html (Accession No. ML040780252).

[4] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 343-45, 356-57 (2002), and *Riverkeeper*, 359 F.3d at 160-61, 168-69.

tion and Energy. *Riverkeeper,* 359 F. 3d at 161; *Private Fuel Storage*, 56 NRC at 343, 356. The agency has reassessed and redefined the postulated threat that serves as the basis for establishing facility security requirements. *Private Fuel Storage*, 56 NRC at 343, 356. It has issued security orders to increase protection against terrorism at all facilities regulated by the agency. *Id.* at 343-44.[5] Those orders have resulted in more security personnel with better training, increased facility security patrols, additional security posts, and physical and vehicle barrier additions and modifications. *Id.* at 344. The orders also require additional security with respect to waterways and owner-controlled land outside of the facilities' protected areas. *Id.* Power plant security forces now number approximately 7,000

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[5] *See Order Modifying Licenses (Effective Immediately),* 67 Fed. Reg. 65,150 (Oct. 23, 2002); *Order Modifying Licenses (Effective Immediately)*, 67 Fed. Reg. 65,152 (Oct. 23, 2002); *Orders Modifying Licenses of All Operating Reactor Licensees*, 68 Fed. Reg. 24,510, 24,514, and 24,517 (May 7, 2003). While Petitioners express dissatisfaction with the NRC proceeding to impose additional security requirements by orders issued to each licensee (*see* Petitioners' Br. at 58), it is clear that the NRC has the authority to impose requirements via enforcement order against individual facilities. 42 U.S.C. § 2201(b); *NAACP v. FPC,* 425 U.S. 662, 668 (1976); *Bellotti v. NRC,* 725 F.2d 1380, 1382 (D.C. Cir. 1983). Petitioners do not contest this authority. Petitioners' Br. at 58.

personnel at 67 sites.[6] NRC licensees have evaluated potential facility vulnerabilities, and developed plans for responding to events causing damage to their plants. *Riverkeeper*, 359 F.3d at 161. Licensees have increased their coordination with law enforcement and military authorities and have imposed additional restrictions on site access. *Private Fuel Storage*, 56 NRC at 344. In total, the industry has spent approximately $500 million on security-related improvements since September 11 and anticipates further expenditures of the same amount, bringing the total to $1 billion.[7]

The NRC performs numerous on-site security vulnerability assessments and exercises to evaluate the effectiveness of security arrangements. *Private Fuel Storage*, 56 NRC at 344. In addition, the NRC has established the Office of Nuclear Security and Incident Response, which is responsible for operational security and safeguards. The new office works closely with law enforcement agencies and

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[6] *See* NEI, *Post-Sept. 11 Security Enhancements: More Personnel, Patrols, Equipment, Barriers, available online at* http://www.nei.org/index.asp?catnum=2&catid=275.

[7] *See* NEI, *U.S. Nuclear Power Plants Meet Deadline for Submitting Revised Security Plans to NRC, available online at* http://www.nei.org/index.asp?catnum=4&catid=551.

the DHS, and coordinates security reviews within the NRC. *Id.* All of these efforts by the NRC are ongoing and are intended to continue.[8]

There can be no doubt that the NRC and the nuclear industry have expended extraordinary efforts and invested significant resources to fulfill their obligation under the AEA to ensure that nuclear facilities are protected against external attacks. Indeed, Petitioners concede that the NRC has "developed a system to maintain a constant state of alert, undertaken a comprehensive review of the adequacy

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[8] The NRC Chairman stated in April 2003 as follows:

> At each step over the past 17 months, we have done what needed to be done to secure these facilities, but as we learn more, I am confident that the NRC, the Department of Homeland Security and other agencies will do whatever it takes to protect the people of this country.

Realistic Conservatism, Remarks of Chairman Nils J. Diaz, United States Nuclear Regulatory Commission, before the NRC Regulatory Information Conference, Washington, D.C. April 16, 2003, NRC News Rel. No. S-03-009, *available online at* http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2003/s-03-009.pdf at 6. *See also,* Remarks by NRC Commissioner Edward McGaffigan, Jr. before the NRC Regulatory Information Conference, Washington, D.C. April 17, 2003, NRC News Rel. No. S-03-012, available online at http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2003/s-03-012.pdf at 4. As part of their effort to keep abreast of security developments, the NRC commissioners receive regular briefings on the threat environment. *See, e.g.,* 69 Fed. Reg. 21585, 21586 (April 21, 2004).

of its safety and security regulations, and upgraded its security requirements for all operating nuclear facilities in the United States." Petitioners' Br. at 30. Petitioners themselves characterize as "tremendous" the NRC's attention to the risks of terrorist attacks and the means to prevent them. *Id.*

It is against this backdrop of concerted agency and industry attention on the terrorism issue that Petitioners' claims must be considered.

SUMMARY OF THE ARGUMENT

As part of the licensing process for the ISFSI, the NRC prepared an Environmental Assessment ("EA"), which evaluated the construction and operation of the facility and concluded that it would have no significant impact on the environment. In accordance with the NRC's earlier holding in *Private Fuel Storage* that NEPA does not require a terrorism review,[9] the agency rejected a proposed contention by Petitioners that challenged the NRC's failure to examine the environmental consequences of a terrorist attack. *Pacific Gas & Electric Co.* (Diablo Canyon

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[9] *See also, Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358 (2002); and *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367(2002).

Power Plant Independent Spent Fuel Storage Installation), CLI-03-1, 57 NRC 1, 6-7 (2003).

In so holding, the NRC followed well-established law developed over a long line of cases. The Supreme Court stated in *Metropolitan Edison v. People Against Nuclear Energy*, 460 U.S. 766, 774 & n.7 (1983), that for NEPA to require consideration of a particular environmental effect, there must be a "reasonably close causal relationship" between the proposed federal action and the effect. As Petitioners acknowledge, the consequences of a terrorist attack against the ISFSI would be caused by unpredictable acts of "malice or insanity" by third parties, not by the licensing of the facility. Petitioners' Br. at 3. Thus, the relationship between the NRC's licensing of the ISFSI and the environmental consequences of hypothetical acts of terrorism is far too attenuated to require consideration under NEPA.

NEPA does not require consideration of the environmental consequences of a hypothetical terrorist attack against a particular nuclear facility because it is not possible to predict the likelihood of such an attack or assess its probability of success or its consequences. Two courts of appeals have rejected claims that the effects of terrorism must be considered in the environmental reviews related to nu-

clear activities because assessing the risk of terrorism is too speculative to be meaningfully considered in the decisionmaking process. *Limerick Ecology Action v. NRC*, 869 F.2d 719, 743-44 (3d Cir. 1989); *New York v. DOT*, 715 F.2d 732, 750 (2d Cir. 1982), *cert. denied*, 465 U.S. 1055 (1984). In the same vein, this Court rejected as speculative a claim that the effects of nuclear war must be considered in the EA for an Air Force strategic nuclear forces communications tower because the tower might be targeted in a war. *No GWEN Alliance, Inc. v. Aldridge*, 855 F.2d 1380, 1385-86 (9th Cir. 1988).

Consideration of a hypothetical, successful terrorist attack on a nuclear facility would also be inconsistent with NEPA in that this would be a "worst case analysis" proscribed by the Supreme Court for "distorting the decisionmaking process by overemphasizing highly speculative harms." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989) (citations omitted).

Finally, a NEPA review would provide no measurable benefit to the public or the NRC. To the extent that the NEPA process informs the public regarding the risks posed by a proposed federal action, such purpose cannot be achieved with respect to security matters. Given the extremely sensitive nature of the information on terrorists' capabilities and the potential vulnerabilities of nuclear facilities, no

NEPA assessment of the likelihood or effects of a terrorist attack against those facilities ought to be publicly released, and any participation by private parties in the NEPA process would have to be severely restricted and kept confidential.

Another purpose of NEPA, i.e., drawing the agency's attention to the risks potentially posed by the licensing of a facility, would also not be achieved. The NRC would gain no information through a NEPA review that it is has not already obtained through the ongoing in-depth examination of the security of nuclear facilities that the agency conducts in the discharge of its AEA responsibilities.

ARGUMENT

I. THE NRC CORRECTLY DECIDED THAT NEPA DOES NOT REQUIRE A TERRORISM REVIEW

The NRC rejected Petitioner's terrorism contention under NEPA citing its well-reasoned decision in *Private Fuel Storage. Diablo Canyon*, CLI-03-1, 57 NRC at 6-7. That decision rested on four independent grounds: (1) "the causal relationship between approving [a] facility and a third party deliberately [attacking] it is too attenuated to require a NEPA review," *Private Fuel Storage*, 56 NRC at 350; (2) "the risk of a terrorist attack on [a particular facility] is beyond [the] agency's ability to determine meaningfully," *id.* at 351; (3) NEPA does not require

assuming a worst-case analysis in which a successful terrorist attack is presumed, *id.* at 351-52; and (4) NEPA's public review process is not an appropriate forum for discussing sensitive security issues, *id.* at 354-55. Each of these grounds provides an independent basis for upholding the *Diablo Canyon* decision.

A. The Causal Relationship Between NRC Facility Licensing and the Effects of Terrorism Is Too Attenuated to Require NEPA Review

Two decades ago, the Supreme Court held that "to determine whether [NEPA] requires consideration of a particular effect, we must look at the relationship between that effect and the change in the physical environment caused by the major federal action at issue." *Metropolitan Edison*, 460 U.S. at 773. NEPA does not require an agency to assess effects that are not "proximately related" to changes in the physical environment resulting from a proposed action. *Id.* at 774. To require consideration of a particular effect, there must be a "reasonably close causal relationship" between the effect and the proposed action. *Id.*

The Supreme Court's holding in *Metropolitan Edison* is dispositive. The occurrence and potential effects of "a terrorist attack or other act of malice or insanity" against a nuclear facility would be the result of criminal actions of third parties, not of the government's action in licensing the facility. A terrorist attack is not a natural, predictable consequence of operating a nuclear facility. Rather, it is

an extraordinary and unpredictable occurrence. Thus, a terrorist attack is not proximately related to a decision to license such a facility.

That this is the case is demonstrated by comparing the types of analysis that are conducted in a NEPA review with that required to examine potential acts of terrorism. The matters considered in environmental assessments–*e.g.*, effects of facility operation on local water, air quality, vegetation, wildlife, local culture and lifestyle–are directly related to the facility's operation. These matters bear no relationship to the issues that would need to be reviewed in examining a potential terrorist attack and its consequences: the status and effectiveness of national defense, intelligence gathering, homeland security, law enforcement, and anti-terrorist programs. *See Private Fuel Storage*, 56 NRC at 347.

Thus, while "the theme of [NEPA] is sounded by the adjective 'environmental,'" *Metropolitan Edison*, 460 U.S. at 772, terrorism is not an issue of environmental policy but of national defense, homeland security, and law enforcement. Therefore, the effects of terrorism are not proximately related to NRC licensing of nuclear facilities, and NEPA does not require a terrorism review.

This same reasoning has been applied by the courts in similar circumstances. For example, in *Glass Packaging Institute v. Regan*, 737 F.2d 1083, 1091-94 (D.C.

Cir.), *cert. denied*, 469 U.S. 1035 (1984), *overruled in part on other grounds, Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 283 n.2 (D.C. Cir. 1988), the District of Columbia Circuit applied *Metropolitan Edison* to hold that NEPA did not require assessing the effects of third party criminal acts following a proposed federal action. In that case, the court rejected a challenge to a Bureau of Alcohol, Tobacco, and Firearms ("Bureau") decision to allow the packaging of liquor in plastic bottles. In permitting the use of plastic bottles, the Bureau had prepared an environmental assessment that petitioners assailed for failing to consider the potential injury or death that could result from criminal tampering with the bottles. *Glass Packaging*, 737 F.2d at 1091-94.

The court rejected this challenge. The potential for tampering with the bottles–a third party criminal act–implicated "[n]o cognizable environmental effect." *Id.* at 1091 (emphasis in original). Including the potential effects of criminal tampering would impermissibly distort the policies served by NEPA:

> The Supreme Court has cautioned that NEPA does not require the agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment. If we were to seize the word "environmental" out of its context and give it the broadest possible definition, the words 'adverse environmental effects' might embrace virtually any consequence of a governmental action that someone thought "adverse."

Id. (quoting *Metropolitan Edison*, 460 U.S. at 772).

Petitioners argue that since terrorist attacks against a nuclear facility are conceivable, they are a natural consequence of allowing the facility to be built and as such require a NEPA review. *See, e.g.*, Petitioners' Br. at 44-47. This argument totally misses the point of *Metropolitan Edison:* the effects of a terrorist attack against nuclear facilities are not *proximately related* to NRC facility licensing. As the NRC has noted, it considers potential accidents caused by foreseeable natural events, *e.g.*, earthquakes, because "such events are closely linked to the natural environment of the area within which a facility will be located." *Private Fuel Storage*, 56 NRC at 347 n.18. "Terrorism [, by contrast,] is a global issue, involving stochastic criminal behavior, independent of the planned facility." *Id.*

Petitioners also claim that the potential for harm from a terrorist attack on a nuclear facility must be considered under NEPA because it could be a consequence of licensing the facility. This argument is identical to the one rejected in *Glass Packing* that harm resulting from criminal tampering with plastic bottles of liquor must be evaluated under NEPA because it is caused by "reasonably foreseeable criminal acts of third parties:"

> *[M]ere foreseeability does not trigger a duty to consider an alleged environmental effect.* The limits to which

> NEPA's causal chain may be stretched before breaking must be defined by the policies and legislative intent behind NEPA [citing Metropolitan Edison, 460 U.S. at 774 n.7]. *NEPA is meant to supplement federal agencies' other nonenvironmental objectives, not to transplant specific regulatory burdens from those expert agencies otherwise authorized to redress specific nonenvironmental problems and pointlessly to reimpose those objectives on other unqualified agencies.*

Glass Packaging, 737 F.2d at 1091-92 (emphasis added, footnote omitted). In light of the agency's substantive power to control tampering with food, "it would be absurd to hold that susceptibility to tampering is an environmental health risk which the Bureau and every other agency must consider in making an environmental assessment." *Id* at 1092. The Court concluded:

> We seriously doubt whether Congress fashioned NEPA as an administrative incarnation of the policeman's squad car, roving the streets in search of sporadic criminal activity which may occasionally occur in the aftermath of an agency action, there to arrest the criminal in the name of "environmental protection."

Id.

The *Glass Packaging Institute* reasoning directly applies here. NEPA is not an administrative incarnation of the armed forces, the DHS, the CIA, the FBI, and other law enforcement agencies, roving in search of sporadic terrorist activity.

Terrorism is a national security issue; it is not an environmental consequence under any reasonable interpretation of NEPA.

Here, as the NRC stated (*see Private Fuel Storage*, 56 NRC at 355), assessing the likelihood and the consequences of a terrorist attack against a nuclear facility (or, for that matter, any facility requiring the preparation of an EA or EIS) would involve poring through large amounts of highly sensitive information regarding the terrorist threat, U.S. military and law enforcement capabilities and intelligence assessments. In performing the review, the NRC would need to step into the shoes of the security agencies and examine—and allow the litigation of—military and law enforcement plans to defend against terrorism, highly sensitive intelligence assessments, and potential foreign policy decisions that could bear on whether terrorist plots against the United States would be initiated in the first place. Interpreting NEPA to require assessment of the effects of terrorism in NRC licensing decisions would stretch NEPA's causal chain beyond what the statute requires. Clearly, `terrorism lies outside the scope of NEPA.[10]

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[10] *See also Breckinridge v. Rumsfeld*, 537 F.2d 864, 867 (6th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977) (rejecting as outside scope of NEPA claim that EA had to consider effects of unemployment caused by closure of military bases).

These judicial holdings reflect the fact that crime, war and terrorism are not "proximately related" to proposed federal actions, *see Metropolitan Edison*, 460 U.S. at 774, but rather are extraordinary events beyond the bounds of NEPA.[11] If such events fell within the scope of the statute, all proposed federal actions requiring an EA or EIS would have to include an analysis of every extraordinary event, including acts of crime, war, terrorism and insanity that could be postulated. Petitioners' logic would necessitate that any NEPA review for a proposed chemical plant, oil pipeline, liquefied natural gas line, skyscraper, dam, bridge and tunnel include postulating a successful attack and evaluating its environmental consequences. NEPA's mandate cannot possibly extend that far.

B. The Probability and Results of a Terrorist Attack on a Nuclear Facility Cannot Be Meaningfully Assessed

In addition to terrorism being outside the realm of environmental policy, assessing the consequences of a successful terrorist attack against a nuclear facility

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[11] The Supreme Court pointed out in *Metropolitan Edison* that that for NEPA to require consideration of a particular effect, there must be a "reasonably close causal relationship" between the proposed federal action and the effect, and that one "must look to the underlying policies or legislative intent" behind NEPA to determine whether such a close relationship exists. 460 U.S. at 774 & n.7. Undoubtedly, the underlying policies and intent behind NEPA are not to examine "acts of malice or insanity" and their impact on proposed facilities.

would necessarily be a speculative endeavor. NEPA does not require the assessment of "remote and speculative" impacts, *Limerick*, 869 F.2d at 739, or impacts that are not "reasonably foreseeable," *Wyoming Outdoor Council, Inc. v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999). A terrorist attack against a particular facility like the ISFSI, its success, and its potential effects, are all remote, speculative and not reasonably quantifiable events and therefore need not be considered.

Indeed, this Court has rejected a claim very similar to Petitioners' on the ground that it was too speculative to warrant consideration under NEPA. In *No GWEN*, 855 F.2d at 1385-86, plaintiffs challenged an Air Force EA for a strategic nuclear forces command and control radio tower for failing to discuss the environmental impact of nuclear war. According to plaintiffs, any geographic area in which a tower was located would become a likely target in the event of war. *Id.* at 1381-82.[12] The Court, however, held that EISs need not discuss remote and speculative consequences. *Id.* at 1385. This limit, flowing from NEPA's "rule of reason," circumscribes the "reasonably foreseeable" impacts that EISs must consider. *Id.* at 1386 & n.1. The Court found that the claim that the tower would be a likely

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[12] The rejected claim in *No GWEN* is identical to Petitioners' assertion that the ISFSI would be an attractive target for terrorism. *See* Petitioners' Br. at 13.

target in the event of a nuclear war (and that, hence, the consequences of a nuclear attack were a foreseeable effect of the project) was speculative. *Id.* at 1386. The court ruled: "the nexus between the construction of [the radio tower] and nuclear war is too attenuated to require discussion of the environmental impacts of nuclear war in an [EA] or [EIS]." *Id.*

Here, the NRC has determined that "the likelihood of a terrorist attack being directed at a particular nuclear facility is not quantifiable. Any attempt at quantification or even qualitative assessment would be highly speculative." *Private Fuel Storage*, 56 NRC at 350. Indeed, there are myriad potential terrorist targets of symbolic, political, military, commercial or strategic importance in the United States, *e.g.*, governmental institutions, chemical facilities, gas and oil pipelines, dams, stadiums, airports, office towers, wholly apart from nuclear facilities.[13] To assert that one particular nuclear installation is a likely terrorism target is sheer speculation.

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[13] Indeed, earlier reports that plans for U.S. nuclear facilities were discovered in terrorist hiding places in Afghanistan have been retracted. Robert Block and Greg Hitt, *White House Backs Away From Bush '02 Nuclear-Terror Warning*, WALL STREET JOURNAL, February 10, 2004, at A4.

The courts have used the same reasoning as did the NRC in *Private Fuel Storage* to reject claims that the effects of terrorism should be considered in nuclear-related environmental reviews. In *Limerick*, the Third Circuit held that NEPA did not require the NRC to consider sabotage risk in a nuclear power plant EIS, because there was no method to accurately assess the probability that the sabotage would occur in the first place; the risk from sabotage was found to be speculative so that it could not be meaningfully considered in the decision-making process. *Limerick*, 869 F.2d at 743-44. Likewise, in *New York*, the Second Circuit upheld the Department of Transportation's decision not to consider the potential effect of sabotage and terrorism against shipments of highly radioactive spent nuclear fuel through New York City because the risk of sabotage and terrorism was "unascertainable." 715 F.2d at 750. Therefore, under the reasoning of *Limerick* and *New York*, the NRC need not perform a NEPA terrorism review.

Petitioner would dismiss the factual underpinnings of *Limerick* as obsolete since the case predates the September 11 attacks. Petitioners' Br. at 17. However, the reasoning in *Limerick*–that a NEPA analysis would be meaningless because it is impossible to accurately assess the probability that an act of terrorism against the

facility in question will take place–remains as valid today as when *Limerick* was written.

Finally, Petitioners point to the government's protective measures for nuclear facilities as evidence that a terrorist attack against the facilities is inevitable. Petitioners' Br. at 45. However, the NRC's measures implementing its AEA mandate to protect nuclear facilities against terrorism does not translate into an agency belief that terrorist attacks against a particular facility are likely to occur, let alone succeed. As the NRC stated in proposing the inclusion of a vehicle bomb threat in its security requirements in 1993, "The design basis threat is a hypothetical threat that is not intended to represent a real threat." *Proposed Rule, Protection Against Malevolent Use of Vehicles at Nuclear Power Plants*, 58 Fed. Reg. 58,804 (1993). NEPA does not require consideration of unquantifiable, "hypothetical threats." Indeed, in holding that NEPA does not require the discussion of the consequences of malevolent third party acts, courts have found the threats of such acts to be speculative, despite the fact that the NRC requires that security measures be taken against potential acts of sabotage or terrorism. *See Limerick*, 869 F.2d. at 742; *New York*, 715 F.2d at 750.

There is no particular reason why a specific nuclear installation would be a preferred target of a terrorist attack, and Petitioners have not alleged that there is any. If it were determined that NEPA required an estimate of the risk of a terrorist attack against the ISFSI, the licensing of every nuclear facility in the country—and perhaps all other private and Federal facilities subject to NEPA review— would require a similarly speculative analysis devoid of factual basis, leading to unreliable results of doubtful usefulness. NEPA cannot be read to require such an empty exercise.

C. NEPA Does Not Require a Worst-Case Analysis of a Presumed Terrorist Attack

Because, as discussed above, a successful terrorist attack against a nuclear facility such as the ISFSI is a speculative, non-quantifiable event, evaluating the consequences of such an attack not only requires assuming that such an event *will* occur, but that it *will* succeed – in other words, a worst case hypothetical scenario in which the facility is singled out for the hypothetical attack, the attack succeeds, and causes the release of radioactive materials to the environment. However, the Supreme Court has held that NEPA does not require "worst case" analyses of potential environmental effects, because such an analyses "distort the decisionmaking process by overemphasizing highly speculative harms." *Robertson*, 490 U.S. at

356. For the same reason, this and other courts of appeals have held that agencies need not consider under NEPA the effects of malevolent acts where there is no meaningful method to assess the probability that such acts will occur. *No GWEN*, 855 F.2d at 1386. *See also Limerick*, 869 F.2d at 743-44; *New York*, 715 F.2d at 750.

In the instant case, even if the NRC had *assumed* that successful terrorist attacks against Diablo Canyon would occur and had proceeded directly to analyze the consequences of the attacks, the EA's conclusion regarding the risk posed by terrorism would still be based entirely on speculation regarding the nature and consequence of the attacks. Such a conclusion, based on an assigned 100% probability of a successful attack and a speculative assessment of its consequences, would grossly overstate the risk posed by terrorism and impermissibly distort the decisionmaking process.[14]

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[14] An example of the meaningless results that are obtained when one tries to estimate the consequences of an assumed terrorist attack against a nuclear facility is found in the Final Environmental Impact Report ("EIR") for the ISFSI prepared by a consultant of San Luis Obispo County. *See* Amicus Curiae Brief of San Luis Obispo County (March 22, 2004), Appendix, at 3-236. The EIR acknowledges that it is "nearly impossible to estimate the probability of an aircraft-based terrorist attack on the . . . ISFSI, much less the likelihood of a successful attack and storage cask containment breach." The EIR then estimates

If all Federal agencies had to employ such a "worst case" analysis and their NEPA reviews had to discuss the possible consequences of terrorism against facilities they planned to build, license or approve, the assessments could conclude that most proposed facilities would be destroyed, many people would be killed, and the environmental impacts would be "high." Such a worst case analysis, suggesting that most proposed Federal actions could lead to widespread destruction from terrorist attacks, would "distort the decisionmaking process by overemphasizing highly speculative harms" and would be impermissible under NEPA. *Robertson*, 490 U.S. at 356.

D. Treating Terrorism as a NEPA Issue Would Provide No Benefit to the Public or the NRC

Practical considerations also demonstrate that NEPA reviews should exclude potential terrorist attacks because such reviews would provide no measurable benefit to either the public or the agency. First, one of the purposes of a NEPA review is to ensure that a decision-making federal agency will have available, and consider, information on the potential consequences of its actions. *Robertson,* 490

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that the consequences of this unknown probability event could lie anywhere between "no additional release of radiation" to 770 square miles becoming "uninhabitable." *See id.* at 3-239.

U.S. at 349. However, as discussed above, the NRC is already undertaking under its AEA authority a thorough review of the security of licensed facilities against terrorist attacks, the nature and consequences of such attacks, and the adequacy of the security provisions implemented at all nuclear facilities. Indeed, since the September 11, 2001 attacks, the agency has repeatedly and significantly increased the anti-terrorism requirements for nuclear facility licensees to meet the terrorist threat. A NEPA review of terrorism would add no significant understanding to the agency beyond what it has obtained and continues to obtain through its safety reviews. Under such circumstances, a NEPA analysis of the terrorism issue would be superfluous.[15] *See Romer v. Carlucci*, 847 F.2d 445, 457 (8th Cir. 1988) (NEPA review of nuclear missile basing decision would not be of "decisional significance" given the availability of "comprehensive information" hence the review was unnecessary).

Another purpose of NEPA is to make relevant information about the environmental impacts of a proposed federal action available to the public, *see Robert-*

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[15] Moreover, as the NRC Chairman has promised, if the ongoing reviews demonstrate that additional measures are needed, the NRC and other agencies "will do whatever it takes to protect the people of this country." *Realistic Conservatism, supra* n.8.

son, 490 U.S. at 349. Here, the sensitivity of the information that would need to be discussed in such a review would entirely preclude its public release.[16] A NEPA review of terrorism in the licensing of nuclear facilities would provide no real benefit to the public.

Thus, a NEPA review of potential terrorist attacks against a nuclear facility such as the ISFSI would provide no real benefits to either the public or the NRC and should not be required.

II. THE NRC PROPERLY DENIED PETITIONERS' REQUEST FOR HEARING ON ADDITIONAL SECURITY MEASURES FOR THE DIABLO CANYON PLANT

Petitioners ask that this Court remand the case to the NRC "for an adjudicatory hearing on security upgrades that must be made to the entire Diablo Canyon complex." Petitioners' Br. at 59. Petitioners have no right to the relief they seek.[17]

Petitioners had a number of avenues available to seek NRC consideration of their concern that the security arrangements for the ISFSI were inadequate. *First,*

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[16] *See, e.g.,* 10 C.F.R. § 2.905 (limiting access to classified information to persons having a need to know (*e.g.*, parties to a proceeding and their counsel) and possessing appropriate security clearances).

[17] It is evident that a hearing on security upgrades at the "entire Diablo Canyon complex" would be wholly outside the scope of the NRC's licensing action, which covers only the ISFSI.

they could have raised (but did not) a contention in the licensing proceeding alleging that the security provisions for the proposed facility failed to comply with applicable regulatory requirements, 10 C.F.R. §§ 2.714(b)(1) and (b)(2). *Second*, they could have filed a request for enforcement relief under 10 C.F.R. § 2.206(a), which allows any person to request the institution of a proceeding to "modify, suspend, or revoke a license, or for any other action as may be proper." Petitioners expressly declined to file such a request. *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 236-37 (2002). *Third*, they could have filed a petition for rulemaking pursuant to 10 C.F.R. § 2.802 (a). They also declined to file such a petition. *Id. Fourth*, they could have filed a petition under 10 C.F.R. § 2.758(b) that the prohibition against challenging NRC regulations in licensing proceedings (*see* 10 C.F.R. § 2.758 (a)) be waived so they could challenge the generic NRC security requirements in the ISFSI licensing proceeding. Again, they failed to take this step.

Petitioners deliberately abstained from pursuing any of these available routes. *See* Petitioners' Br. at 58. *See also* CLI-02-23, 56 NRC at 236-37. Instead, Petitioners took the unorthodox approach of filing a motion with the NRC Commission asking, *inter alia*, for the suspension of the licensing proceeding

pending a comprehensive review of the adequacy of NRC's provisions to protect against terrorist threats. *Id.* at 236. The Commission declined to suspend the ongoing licensing proceeding because it saw no danger to public health and safety from the proceeding's continuation, and because the anti-terrorism measures that the NRC had taken and was developing were adequate, particularly since the ISFSI would not be operational until 2006. *Id.* at 239.

Before this Court, Petitioners argue that they were denied the statutory right to a hearing granted by Section 189a of the AEA, 42 U.S.C. § 2239(a) on what additional security measures would be required "for the entire Diablo Canyon nuclear complex." Petitioners' Br. at 56-57. Petitioners further assert that the NRC's denial of Petitioners' request to suspend the licensing proceeding for the ISFSI is improper because "security upgrades have been made solely through individual enforcement orders" and Petitioners acknowledge they have no standing to obtain a hearing on the adequacy of those enforcement orders. Petition at 56-58.

Contrary to Petitioners' assertions, a hearing was provided for licensing of the ISFSI and Petitioners participated in it. However, they consciously waived the opportunity to seek to raise security issues at that hearing.

In addition, the Commission did not ignore Petitioners' concerns, but referred their petition (and attachments) to the NRC Staff for appropriate consideration as the staff continues its review of security measures. CLI-02-23, 56 NRC at 236. That information was and continues to be available to the agency as it formulates security policies. The Commission also noted that Petitioners can raise their concerns, if they choose, at any rulemaking proceeding that is instituted on security issues. *Id.*[18]

Given the NRC's and the industry's efforts towards enhancing security at nuclear facilities, including the ISFSI, it is clear that the NRC has discharged its obligations under the AEA to protect public safety against terrorism. To the extent that Petitioners disagreed, they had means at their disposal to pursue their disagreement and failed to use them. Thus, any harm they have allegedly suffered from not having their arguments further considered is self-inflicted.

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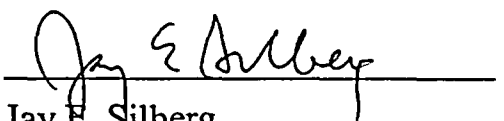
[18] Petitioners complain that to date the NRC "has not instituted a single rulemaking to establish changes in the design basis threat and other security-related measures for the Diablo Canyon nuclear plant or the ISFSI." Petitioners' Br. at 57. However the NRC may, as it has done here, institute new requirements through enforcement orders in individual cases rather than by rulemaking. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978). In any event, Petitioners do not have to wait for the NRC to institute a rulemaking proceeding but, as noted above, are free at any time to file a rulemaking petition on their own. 10 C.F.R. § 2.802(a).

CONCLUSION

In the final analysis, what Petitioners primarily seek is to complicate the NRC licensing process by distorting NEPA. Were Petitioners to succeed in their objective, they would set a detrimental precedent that would make NRC licensing actions, and the completion of countless private and governmental projects, more burdensome and time consuming with no countervailing benefits to the public. Petitioners' goal, however, runs contrary to the purposes of NEPA and the clear rulings of the Supreme Court, this Court, and every Court of Appeals that has considered the issue.

For the foregoing reasons, the NRC's conclusion that terrorism need not be analyzed under NEPA is correct and its decision in *Diablo Canyon* should be affirmed.

Respectfully submitted,



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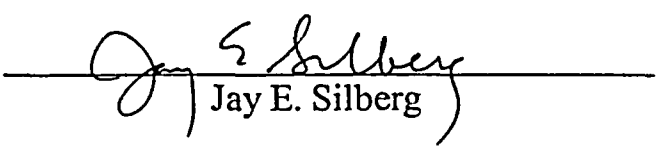
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), Federal Rules of Appellate Procedure, and Circuit Rule 32-1, I hereby certify that the foregoing "Amicus Brief of the Nuclear Energy Institute in Support of Respondents" is proportionally spaced, has a type-face of 14 points or more, and contains 6,780 words, including headings, footnotes, table of contents, table of authorities, but excluding this certificate and the certificate of service. In making this certification, I have relied on the word count function of Microsoft Word, the word-processing system used to prepare this brief.



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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2004, copies of the foregoing "Amicus Brief of the Nuclear Energy Institute in Support of Respondents" were served as follows:

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